

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Master in Equity

Gordan G. Cooper, Master in Equity

Case No. 2010-CP-42-6118

Wells Fargo Bank, National
Association, successor in interest
by merger to Wachovia Bank,
National Association, successor
in interest by merger to
SouthTrust Bank, N.A.,

Respondent,

LAST

v.

C&S Carolina Ventures, LLC,
Liberty Consulting & Investment,
Inc., Rodney A. Cobb, Michael
C. Copps, Victor C. Smith, and
Herbert W. Smith, Jr.,

Appellant.

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SC Court of Appeals

NOTICE OF APPEAL

C&S Carolina Ventures, LLC, Liberty Consulting & Investment, Inc., Michael C. Copps, Victor C. Smith, and Herbert W. Smith, Jr. appeal the Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment by the Honorable Gordan G. Cooper dated June 22, 2012 (Exhibit A) and the Order Denying Defendants' Motion to Alter or Amend Order and Defendants' Motion to Amend Pleadings dated October 25, 2012 (Exhibit B). The Order Denying Defendants' Motion to Alter or Amend Order and Defendants' Motion to Amend Pleadings was filed on October 25, 2012.

November 21, 2012



Aaron E. Edwards
The Richter Firm, LLC
622 Johnnie Dodds Blvd.
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(843) 849-6000
Attorney for Appellant

Other Counsel of Record:
Frank B. B. Knowlton
Tara C. Sullivan

Nelson Mullins Riley & Scarborough LLP
1320 Main Street/17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
803-799-2000
Attorneys for Respondent

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NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Master in Equity

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v.

SC Court of Appeals

C&S Carolina Ventures, LLC,
Liberty Consulting & Investment,
Inc., Rodney A. Cobb, Michael
C. Copps, Victor C. Smith, and
Herbert W. Smith, Jr.,

Appellant.

Proof of Service

I certify that I have served the Appellant's Notice of Appeal by depositing a copy of it in the United States Mail, postage prepaid, on November 21, 2012, addressed to the attorneys of record, Frank Knowlton and Tara Sullivan, Nelson Mullins Riley & Scarborough LLP, Post Office Box 11070, Columbia, SC 29211-1070.

November 21, 2012

Aaron E. Edwards
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622 Johnnie Dodds Blvd.
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Attorneys for Respondent

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*Licensed in IL only

November 21, 2012

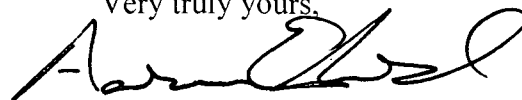
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Wells Fargo Bank v. C&S Carolina Ventures, LLC, et al
Case No.: 2010-CP-42-6118

Dear Madam Clerk:

Enclosed please find the Notice of Appeal with regards to the above-referenced matter. Please file the originals and return the file-stamped copies to our office in the enclosed, self-addressed, stamped envelope. Also enclosed please find the requisite \$100.00 filing fee. By copy of this letter to Frank Knowlton and Tara Sullivan, attorneys for the Respondent, I am serving them with a copy of the same.

Very truly yours,



Aaron E. Edwards

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Enclosures

cc: Frank Knowlton, Esq.
Tara Sullivan, Esq.

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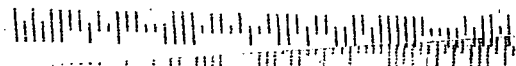
SC Court of Appeals

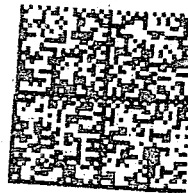
THE RICHTER FIRM, LLC

Attorneys & Counselors at Law

622 Johnnie Dodds Boulevard
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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211





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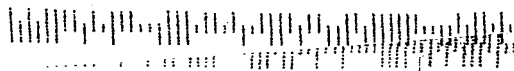
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The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211



STATE OF SOUTH CAROLINA)
)
COUNTY OF SPARTANBURG)

IN THE COURT OF COMMON PLEAS
SEVENTH JUDICIAL CIRCUIT

Wells Fargo Bank, National Association,)
successor in interest by merger to)
Wachovia Bank, National Association,)
successor in interest by merger to)
SouthTrust Bank, N.A.,)

Civil Action No. 2010-CP-42-6118

Plaintiff,)

vs.)

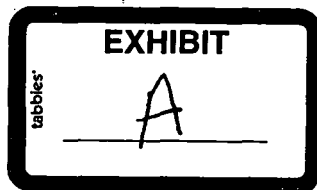
C&S Carolina Ventures, LLC, Liberty)
Consulting & Investment, Inc., Rodney)
A. Cobb, Michael C. Copps, Victor C.)
Smith, and Herbert W. Smith, Jr.,)

Defendants.)

ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT AND DENYING
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

This matter came before the Court at 3:30 p.m. on Tuesday, June 12, 2012, for the purpose of hearing the Motion for Summary Judgment filed by Plaintiff Wells Fargo Bank, National Association, successor in interest by merger to Wachovia Bank, National Association, successor in interest by merger to SouthTrust Bank, N.A. ("Plaintiff"). Defendants C&S Carolina Ventures, LLC, Liberty Consulting & Investment, Inc., Michael C. Copps, Victor C. Smith, and Herbert W. Smith, Jr. ("Defendants") filed a Motion for Summary Judgment based on Plaintiff's alleged unauthorized practice of law on June 12, 2012, and served this Motion on Plaintiff at the hearing. After a review of these matters and hearing arguments from Plaintiff and Defendants, Plaintiff's Motion for Summary Judgment is **GRANTED** and Defendants' Motion for Summary Judgment is **DENIED**:

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FINDINGS OF FACTS:

1. On January 15, 1999, Defendant C&S Carolina Ventures, LLC, ("C&S"), for value received, executed and delivered to Plaintiff a promissory note in the original principal amount of \$3,332,317.24, with interest thereon ("Note").

2. In consideration of the Note, C&S executed and delivered to Plaintiff a real estate mortgage and security agreement ("Mortgage") dated January 15, 1999, and recorded in the Office of the Register of Deeds for Spartanburg County on March 1, 1999, in Mortgage Book 2177 at Page 219, wherein and whereby C&S mortgaged to Plaintiff 16.61 acres of real property located in or near Duncan, South Carolina, and more fully described in the Mortgage ("Property").

3. The Note and Mortgage were extended and modified by a Forbearance Agreement dated April 7, 2009, which extended the maturity date of the loan to December 1, 2009 ("Forbearance Agreement").

4. In further consideration of the Note, C&S executed and delivered to Plaintiff an assignment of leases, rents and profits ("Assignment of Leases") dated January 15, 1999, and recorded in the Office of the Register of Deeds for Greenville County on March 1, 1999, in Book 69-M at Page 77.

5. In further consideration of the Note, the Defendants Liberty Consulting Investment, Inc. ("Liberty Consulting"), Rodney A. Cobb ("Cobb"), Michael C. Copps ("Copps"), Victor C. Smith ("Victor Smith"), and Herbert W. Smith, Jr. ("Wayne Smith") each executed a guaranty dated January 15, 1999, whereby they individually, jointly and severally, absolutely and unconditionally guaranteed the payment of the Note to Plaintiff, and all

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extensions and renewals thereof ("Guarantees," and collectively with the Note, Mortgage, Forbearance Agreement, and Assignment of Leases, the "Loan Documents").

6. The Defendants have defaulted under the Loan Documents.

7. On November 16, 2010, Plaintiff filed the within action seeking foreclosure of the Property and collection on the Guarantees.

8. Defendant Rodney A. Cobb has not responded to Plaintiff's Complaint, and an Affidavit of Default has been filed against him.

9. Defendants filed an Answer on January 7, 2011, asserting the affirmative defenses of failure to state a claim upon which relief can be granted, failure to mitigate damages, waiver, estoppel, laches, that Defendants acted reasonably and in good faith at all times, and that Plaintiff is required to produce the original notes and mortgage which are the subject of this action.

10. Defendants' Answer does not assert any affirmative defense based on unclean hands, unauthorized practice of law, or Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011), and its related line of cases. Counsel for Defendants admitted that there was no defense in their Answer labeled as unclean hands, unauthorized practice of law, or the Matrix line of cases.

11. Defendants' written responses to Plaintiff's Interrogatories and their documents produced in response to Plaintiff's Requests for Production provide no indication of Defendants' intent to assert a defense based on unclean hands, unauthorized practice of law, or the Matrix line of cases. Counsel for Defendants admitted that the only documents related to such a defense are the Loan Documents.

12. Defendants' service of their Motion for Summary Judgment on Plaintiff at the hearing on Plaintiff's Motion for Summary Judgment was Defendants' first notice to Plaintiff that

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Defendants intended to assert a defense based on unclean hands, unauthorized practice of law, or the Matrix line of cases.

13. Defendants had not filed a Motion to Amend their Answer to assert a defense based on unclean hands, unauthorized practice of law, or the Matrix line of cases at the time of the hearing.

CONCLUSIONS OF LAW:

1. Plaintiff is entitled to summary judgment as to its claim for foreclosure and collection on the Guarantees in this matter because there is no genuine issue of material fact regarding Defendants' default and liability under the Loan Documents.

2. Defendants admitted execution of the Loan Documents.

3. Defendants admitted that they are in default.

4. Defendants admitted that the balance due and payable on the Note is \$2,604,028.14, which amount represents principal, interest, and late fees due as of September 30, 2010.

5. Furthermore, although Defendants asserted affirmative defenses, they failed to put forth sufficient evidence to support these defenses.

6. Defendants have no basis for their affirmative defense that Plaintiff failed to state a claim for which relief can be granted, and to the contrary, admit that Plaintiff has the right to the foreclosure relief which it seeks.

7. Defendants have no basis for their affirmative defense that Plaintiff somehow waived its right to foreclose.

8. Defendants have no basis for their affirmative defense that Plaintiff should be estopped from foreclosing on the Loan Documents. Defendants admit that they did not do

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anything differently in reliance on Plaintiff's actions, a requirement for an estoppel claim. See Langdale v. Carpets, 395 S.C. 194, 205, 717 S.E.2d 80, 85 (Ct. App. 2011) ("To successfully assert the doctrine of estoppel, a party must show a (1) lack of knowledge and of the means of knowledge of the truth as to the facts in question, (2) reliance upon the conduct of the party estopped, and (3) prejudicial change in position." (citing S. Dev. Land & Golf Co. v. S.C. Pub. Serv. Auth., 311 S.C. 29, 33, 426 S.E.2d 748, 750 (1993))).

9. Defendants have no evidence for their affirmative defense of laches. Defendant Suit specifically testified that Defendants would have benefitted from Plaintiff waiting even longer to bring its foreclosure action because they would have had more opportunity to sell the Property had the bank not foreclosed as soon as it did. Defendant Wayne Smith also testified that it would have been better for the bank to wait longer to foreclose because the Property is more valuable than what Defendants owe Plaintiff and that once the economy is turned around the Property can be sold for that amount or more.

10. Defendants have no basis for their affirmative defense that Defendants acted reasonably and in good faith at all times. While Defendants may have acted reasonably and in good faith at all times, they admit that this does not prevent Plaintiff's foreclosure in any way because they have not paid the loan.

11. Defendants have no basis for their affirmative defense that Plaintiff is required to produce the original subject note and mortgage. There is no such requirement that Plaintiff produce the original subject note and mortgage. Plaintiff's Affidavit establishes that Plaintiff is the current owner and holder of the Loan Documents, and Defendants have not put forth any evidence to suggest otherwise.

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12. Defendants have no basis for their affirmative defense that Plaintiff failed to mitigate its damages.

13. Plaintiff had no duty to mitigate its damages in this matter. Once Defendants defaulted, Plaintiff was entitled to demand the full balance due on the subject loan and was not obligated to accept a lesser amount. See Cisson Const., Inc. v. Reynolds & Associates, Inc., 311 S.C. 499, 503-04, 429 S.E.2d 847, 849-50 (Ct. App. 1993) (citing 22 Am. Jur. 2d Damages § 506 (1988)).

14. In Cisson, the Court of Appeals found that a lender had no duty to mitigate its damages where it had a right under its loan documents to recover the full amount sought and upheld summary judgment in favor of the lender. Id.

15. Specifically, the Cisson court noted that the note and guaranty provided remedies to the lender upon default. Id. Under the note, the lender was "permitted to enforce the note in its full amount against any party to the note or guaranty." Id. Furthermore, the guaranty did not obligate the lender "to preserve the collateral given by [the borrower], to pursue or exhaust a particular remedy, or to take any action before seeking full payment of the note from [the guarantor]." Id.

16. Here, the Note similarly provides that Plaintiff may enforce the Note in full amount against any party to the Note or Guarantees upon default:

If I [defined in the Note as including each borrower and guarantor] am in default on this note you have, but are not limited to, the following remedies: (1) You may demand immediate payment of all I owe you under this note (principal, accrued unpaid interest and other accrued charges).

17. The Guarantees also provide that upon default Plaintiff is not obligated to preserve the collateral, to pursue or exhaust a particular remedy, or to take any action before seeking full payment of the Note from the Defendant guarantors:

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In the event Borrower at any time defaults in the payment or performance of any of the Guaranteed Obligations as and when the same becomes due, whether by acceleration of maturity of the debt or obligation or otherwise, Guarantor agrees to pay such debt or perform such obligation immediately. Upon failure of Guarantor to do so, Bank may, in its discretion, enforce the collection of such debt or the performance of such obligation against Guarantor by action in any court of competent jurisdiction, or in any other manner provided by law, the same as if such debt or obligation were the primary and individual debt or obligation of Guarantor, and without first seeking to enforce such debt or obligation by action or otherwise against Borrower, or Bank may, in its discretion, proceed in any manner provided by law or by contract for collection of debts against either or both Guarantor and Borrower, the same as if such debts and obligations were primarily and individually the debt of both Guarantor and Borrower, jointly and severally.

Guarantor hereby irrevocably . . . [c]onsents that Bank may, without discharging Guarantor or in any way affecting the obligations of Guarantor under this Guaranty: (i) exchange, release or surrender to Borrower or to any guarantor or any other person, or waive, release, subordinate, fail to perfect any lien or security interest in, or otherwise impair, any collateral now or hereafter held as security for any of the Guaranteed Obligations; (ii) waive or delay the exercise of any of its rights or remedies against Borrower or any other person or entity, including, without limitation, Guarantor; (iii) with or without consideration, release Borrower or any other person or entity, including, without limitation, any other guarantor of the Guaranteed Obligations . . .

All of Bank's rights and remedies under this Guaranty, under any other agreement, and under applicable law shall be cumulative, and any failure of the Bank to exercise any such right or remedy shall not be construed as a waiver of the right to exercise the same or any other right or remedy at any time, and from time to time, thereafter.

18. Therefore, the Loan Documents provide Plaintiff the vested right to recover the full amount sought, and any refusal or failure by Plaintiff to accept a purchase contract for less than the full amount owed by Defendants cannot be used as a defense to the foreclosure.

19. In support of their failure to mitigate defense, Defendants alleged that they think there was a previous offer for the property on which the bank did not make a decision causing

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the buyer to walk away from the deal. However, Defendants were unable to specify the identity of the buyer, the amount of the offer, whether there was actually a written purchase offer, which of the four buildings on the property the buyer was interested, whether the offer was for the building that was subsequently purchased and released from the mortgage, and whether there was an appraisal associated with the offer. Such vague allegations are simply insufficient to show that Plaintiff failed to mitigate its damages.

20. Furthermore, Defendants admit that this offer was made after C&S was in default on the subject loan, and therefore, Plaintiff was under no obligation to accept the offer. See Cisson, 311 at 503-04, 429 S.E.2d at 849-50.

21. Defendants also alleged that there was an offer to purchase a portion of the property by a company that wanted to place a cell phone tower there to which the bank did not respond. Defendants produced a "Letter of Intent" from Newton Realty dated November 15, 2010, conveying an offer by a Clear Talk affiliate to purchase 7,500 square feet of the subject property for \$25,000.00. The Letter of Intent indicated that the contemplated Purchase Agreement would be contingent upon the purchaser's obtaining all necessary local, state, and federal permits to construct the cell phone tower. It also provided that the purchaser would have 180 days to determine if the property would be suitable for their intended use and could terminate the Purchase Agreement if it determined the property was not suitable. This was hardly a firm, final purchase offer for the property that failed due to any lack of approval by Plaintiff.

22. Furthermore, Defendants admit that although they verbally discussed this offer with Plaintiff, they never sent a copy of this Letter of Intent to Plaintiff.

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23. Defendants also acknowledged that there was no deadline to respond conveyed to them by the prospective purchaser, that Defendants did not give Plaintiff a deadline to respond, and that Plaintiff was not aware that there was any deadline to respond.

24. Most importantly, the Letter of Intent was dated after Defendants' default and only one day before this foreclosure action was filed. At that time, Plaintiff was not obligated to accept any offer for the subject property for less than the full amount owed by Defendants. See Cisson, 311 at 503-04, 429 S.E.2d at 849-50.

25. Finally, Defendants' argument that Plaintiff failed to mitigate its damages by requiring Defendants to withdraw their affirmative defenses in exchange for Plaintiff's approval of any purchase contracts is without merit.

26. Plaintiff was within its rights to seek Defendants' withdrawal of their affirmative defenses as part of settlement negotiations to resolve this litigation, and such action is not admissible to prove Plaintiff's failure to mitigate. S.C. R. Ev. 408 ("Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible.")

27. In any event, Plaintiff was not obligated to accept any offer for the subject property for less than the full amount owed by Defendants, and therefore, Plaintiff's requirement that Defendants withdraw their affirmative defenses in exchange for Plaintiff's approval of any purchase contracts is irrelevant. See Cisson, 311 at 503-04, 429 S.E.2d at 849-50.

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28. As such, Defendants failed to produce sufficient evidence supporting their affirmative defense that Plaintiff failed to mitigate its damages.

29. Because Defendants admitted their execution of the Loan Documents, subsequent default, and amount remaining due on the Loan Documents, and because they have failed to present sufficient evidence to support their affirmative defenses, summary judgment in favor of Plaintiff is granted. Plaintiff is entitled to foreclosure of the Property and collection on the Guarantees and dismissal of Defendants' affirmative defenses.


30. Defendants are not entitled to summary judgment based on their allegations of Plaintiff's unauthorized practice of law.

31. Defendants' Answer filed on January 7, 2011, does not assert any affirmative defense based on unclean hands, unauthorized practice of law, or Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011), and its related line of cases.

32. Defendants' argument that its Answer includes defenses, such as waiver or estoppel, that encompass unclean hands, unauthorized practice of law, or the Matrix line of cases is without merit. The affirmative defenses asserted by Defendants are specific defenses, each with its own particular meaning, and are not broad enough to include unclean hands, unauthorized practice of law, or the Matrix line of cases.

33. Furthermore, Defendants have not put Plaintiff on notice of its intent to assert unclean hands, unauthorized practice of law, or the Matrix line of cases during the nearly nineteen months this case has been pending by addressing it in their responses to Plaintiff's discovery requests or producing any documents related thereto.

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34. At the time of the hearing, Defendants had not filed a Motion to Amend their Answer to assert the defense of unclean hands, unauthorized practice of law, or the Matrix line of cases.

35. Defendants' first notice of its intent to assert unclean hands, unauthorized practice of law, or the Matrix line of cases came after completion of written discovery and the depositions of all Defendants and Defendants' depositions of an employee and a former employee of Plaintiff and took place at the hearing on Plaintiff's Motion for Summary Judgment when counsel for Defendants served Plaintiff with Defendants' Motion for Summary Judgment.

36. Rule 8(b) of the South Carolina Rules of Civil Procedure "requires that a defendant provide a statement 'in short and plain terms [of] the facts constituting his defenses to each cause of action asserted.' The Rule further mandates that a pleading contain 'ultimate facts' rather than 'evidentiary facts' to state a cause of action. 'Ultimate facts fall somewhere between the verbosity of evidentiary facts and the sparsity of 'legal conclusions.'" RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 473, 597 S.E.2d 881, 884 (Cl. App. 2004) (internal citations omitted).

37. In RoTec Servs., the Court of Appeals found no abuse of discretion where a trial court struck a privilege defense as insufficiently pled where the defendant's answer simply read that "Defendant pleads the affirmative defense of privilege" because such a statement is legal conclusion and falls below the pleading standard of Rule 8. Id.; see also Turner Coleman, Inc. v. Ohio Const. & Engineering, Inc., 272 S.C. 289, 290-91, 251 S.E.2d 738, 739-40 (1979) (holding that a borrower did not plead the affirmative defense of mistake, and therefore, it was not properly before the trial court and would not preclude summary judgment in favor of lender).

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38. Here, Defendants' Answer completely fails to assert even the legal conclusion that Defendants were pleading any defense based on unclean hands, unauthorized practice of law, or the Matrix line of cases.

39. Therefore, the defense of unclean hands, unauthorized practice of law, or the Matrix line of cases has not been adequately plead in accordance with Rule 8(b) of the South Carolina Rules of Civil Procedure.

40. Defendants' summary judgment motion is accordingly denied.

CONCLUSION

Based on the foregoing, Plaintiff is entitled to summary judgment as to its claims against the Defendants and as to the affirmative defenses asserted by Defendants, and Defendant is not entitled to summary judgment on its allegations regarding the unauthorized practice of law. Therefore, it is hereby

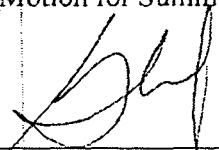
ORDERED that Plaintiff's Motion for Summary Judgment is granted; and it is further

ORDERED that Plaintiff is entitled to foreclosure of the Property and collection on the Guarantees; and it is further

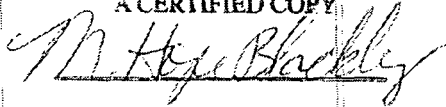
ORDERED that Defendants' affirmative defenses are hereby dismissed; and it is further

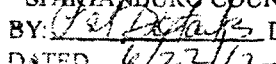
ORDERED that Defendants' Motion for Summary Judgment is denied

AND IT IS SO ORDERED.


The Honorable Gordon G. Cooper
Master-in-Equity for Spartanburg County

A CERTIFIED COPY



CLERK OF COURT
SPARTANBURG COUNTY
BY:  D.C.
DATED 6/22/12

June 21, 2012

Spartanburg, South Carolina

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SPARTANBURG COUNTY
2012 JUN 22 AM 9:41
M. HOPE BLACKLEY

STATE OF SOUTH CAROLINA
 COUNTY OF SPARTANBURG
 IN THE COURT OF COMMON PLEAS

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2010-CP-42-6118

Wells Fargo Bank, N.A., successor in interest by merger to

C&S Carolina Ventures, LLC, Liberty Consulting & Investment, Inc., Rodney A. Cobb, Michael C. Copps,

Wachovia Bank, N.A., successor in interest by merger to South Trust Bank, N.A.

Victor C. Smith, and Herbert W. Smith, Jr.

PLAINTIFF(S)

DEFENDANT(S)

Submitted by: Tara C. Sullivan	Attorney for : <input checked="" type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant
	or <input type="checkbox"/> Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ACTION DISMISSED (CHECK REASON):** Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit); Rule 43(k), SCRPC (Settled); Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRPC; Bankruptcy; Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded; Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.

Additional Information for the Clerk : Plaintiff's Motion for Summary Judgment Granted and Defendants' Motion for Summary Judgment Denied

INFORMATION FOR THE PUBLIC INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount to be Enrolled (List amount(s) below)
Wells Fargo Bank, National Association	C&S Carolina Ventures, LLC, Liberty Consulting & Investment, Inc., Rodney A. Cobb, Michael C. Copps, Victor C. Smith, and Herbert W. Smith, Jr.	\$
		\$
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 SPARTANBURG COUNTY

If applicable, describe the property, including tax map information and address, referenced in the order: ALL THAT CERTAIN piece, parcel or lot of land, with all improvements thereon, situate, lying and being in the State of South Carolina, County of Spartanburg, in or near the town of Duncan, being known and designated as Tract A, containing 13.25 acres, and Tract B, containing 3.36 acres, comprising a total of 16.61 acres, all as shown on a plat of survey entitled "Survey for Robert J. Elliott and Donna C. Elliott" prepared by Landreth Surveying, dated April 29, 1994, and recorded in the RMC Office for Spartanburg County in Plat Book 125 at Page 278, and having, according to said plat, the following metes and bounds, to-wit:

BEGINNING at a 3/4" open top pipe lying within the right-of-way of Victor Woods Chapel Road at a joint corner with property now or formerly of Iris E. Bearden and property now or formerly of Donald G. Blackwell and Penny B. Blackwell, said pipe lying 4611 feet, more or less, in a northerly direction from the intersection of Victor-Woods Chapel Road with S.C. Highway 42-221, and running thence through the right-of-way of Victor-Woods Chapel Road S. 45-08-22 W., 33.67 feet to a nail and cap on the center line of the right-of-way of Victor-Woods Chapel Road; thence turning and running along the center line of the right-of-way of Victor-Woods Chapel Road N. 85-12-33 W., 728.05 feet to a nail and cap in the center line of the right-of-way of Victor-Woods Chapel Road; thence turning and running along a joint line with property now or formerly of Bertha W. Smith N. 04-48-09 E., 939.20 feet to a 3/8" rebar in the center line of the right-of-way of McClure Smith Road; thence turning and running along the center line of the right-of-way of McClure Smith Road, the following courses and distances: N. 54-28-05 E., 115.53 feet to a 3/8" rebar; thence N. 65-57-34 E., 112.74 feet to a 3/8" rebar; thence N. 55-40-40 E., 112.53 feet to a 3/8" rebar; thence N. 67-44-47 E., 97.45 feet to a 3/8" rebar; thence N. 74-23-38 E., 168.48 feet to a 3/8" rebar in the center line of McClure Smith Road at a joint corner with property now or formerly of Iris D. Bearden; thence turning and running along a joint line with property now or formerly of Iris D. Bearden S. 05-57-00 E., 1238.37 feet to a 3/4" open top pipe lying within the right-of-way of Victor-Woods Chapel Road, being the point of beginning.

LESS AND EXCEPTING:

All that certain piece, parcel or tract of land, containing 3.35 acres, more or less, situate, lying and being in the County of Spartanburg, State of South Carolina, being shown and designated as Tract B, on plat prepared by Site Design, Inc., dated April 21, 2011, and recorded in the Office of the Register of Deeds for Spartanburg County in Plat Book 165 at Page 963. Reference to is hereby made to said plat for a complete metes and bounds description of the property.

TOGETHER WITH a non-exclusive easement forty (40') feet in width, located on remaining property of C&S Carolina Ventures, LLC, running along the western boundary of the above described property for a distance of 569.54 feet and being shown as "Proposed 40.0' Ingress/Egress Easement" on the above referenced plat. Said easement shall be for the purpose of providing Grantee, its successors and assigns use of the road located within said easement for ingress to and egress from the above described property.

This is the same property conveyed to C&S Carolina Ventures, LLC by Robert J. Elliott and Donna C. Elliott by Deed dated October 11, 1995 recorded in Book 63J at Page 696 in the Office of the Register of Deeds for Spartanburg County, South Carolina.

TMS No.: 5-24-00-043.06

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed, such as interest or additional taxable costs, not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

Circuit Court Judge  Judge Code 3065 Date 6/22/2012

For Clerk of Court Office Use Only

This judgment was entered on the 22 day of June, 2012 and a copy mailed first class or

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placed in the appropriate attorney's box on this
to parties (when appearing pro se) as follows:

22 day of June, 2012 to attorneys of record or

ATTORNEY(S) FOR THE PLAINTIFF(S)

Court Reporter:

ATTORNEY(S) FOR THE DEFENDANT(S)

M. Hope Blackley
CLERK OF COURT
P. J. DeLoach

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STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
COUNTY OF SPARTANBURG) SEVENTH JUDICIAL CIRCUIT

Wells Fargo Bank, National Association,) Civil Action No. 2010-CP-42-6118
successor in interest by merger to)
Wachovia Bank, National Association,)
successor in interest by merger to)
SouthTrust Bank, N.A.,)

Plaintiff,)

vs.)

C&S Carolina Ventures, LLC, Liberty)
Consulting & Investment, Inc., Rodney)
A. Cobb, Michael C. Copps, Victor C.)
Smith, and Herbert W. Smith, Jr.,)

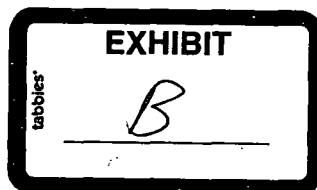
Defendants.)

ORDER DENYING
DEFENDANTS' MOTION TO
ALTER OR AMEND ORDER AND
DEFENDANTS' MOTION TO
AMEND PLEADINGS

This matter came before the Court at 3:30 p.m. on Tuesday, October 16, 2012, for the purpose of hearing the Motion to Alter or Amend this Court's Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment and Motion to Amend Pleadings filed by Defendants C&S Carolina Ventures, LLC, Liberty Consulting & Investment, Inc., Michael C. Copps, Victor C. Smith, and Herbert W. Smith, Jr. ("Defendants"). After a review of these matters and hearing arguments from counsel for Defendants and Plaintiff Wells Fargo Bank, National Association, successor in interest by merger to Wachovia Bank, National Association, successor in interest by merger to SouthTrust Bank, N.A. Plaintiff's Defendants' Motion to Alter or Amend Order and Defendants' Motion to Amend Pleadings are

DENIED:

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FINDINGS OF FACTS:

1. Plaintiff filed this action on November 16, 2010, seeking foreclosure of property located in Spartanburg County, South Carolina, and collection on guarantees executed by Defendants.

2. Defendants filed an Answer on January 6, 2011, asserting the affirmative defenses of failure to state a claim upon which relief can be granted, failure to mitigate damages, waiver, estoppel, laches, that Defendants acted reasonably and in good faith at all times, and that Plaintiff is required to produce the original note and mortgage which are the subject of this action.

3. After completion of discovery in the matter, Plaintiff filed a Motion for Summary Judgment seeking summary judgment on its claims against Defendants and dismissal of Defendants' affirmative defenses against it on March 15, 2012.


4. At the hearing on Plaintiff's Motion for Summary Judgment on June 12, 2012, Defendants filed and served on Plaintiff a Motion for Summary Judgment based on Plaintiff's alleged unauthorized practice of law.

5. The parties were made aware of this Court's decision on the Motions on June 13, 2012.

6. Plaintiff's Motion for Summary Judgment was granted. This Court found that there was no genuine issue of material fact, ordered that Plaintiff is entitled to foreclosure of the property and collection on the guarantees, and dismissed Defendants' affirmative defenses.

7. This Court denied Defendants' Motion for Summary Judgment and the Defendants had not plead the affirmative defense of unclean hands, unauthorized practice of law or Matrix Fin. Servs. Corp. v. Frazer, 394 S.C. 134, 714 S.E.2d 532 (2011), and its related cases.

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8. On the day summary judgment was granted to Plaintiff and Defendants' Motion for Summary Judgment was denied, Defendants filed the instant Motion to Amend Pleadings for leave to amend their Answer to plead the defense of unclean hands/unauthorized practice of law.

9. Defendants filed the instant Motion to Alter or Amend this Court's Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment on July 3, 2012.

CONCLUSIONS OF LAW:

1. This Court's Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment is correct because Defendants failed to plead the affirmative defense of unclean hands/unauthorized practice of law as required by the South Carolina Rules of Civil Procedure.

2. Rule 8(b) of the South Carolina Rules of Civil Procedure provides that "[a] party shall state in short and plain terms the facts constituting his defenses to each cause of action asserted" Rule 8, SCRPC; see also RoTec Servs., Inc. v. Encompass Servs., Inc., 359 S.C. 467, 597 S.E.2d 881 (Ct. App. 2004) (affirming striking of privilege defense where defendant plead the affirmative defense of privilege but failed to plead any facts in support of the defense).

3. Rule 8 also provides:

In pleading to a preceding pleading, a party shall set forth affirmatively the defenses: accord and satisfaction, arbitration and award, assumption of risk, condonation, contributory negligence, discharge in bankruptcy, duress, ~~fraud~~, illegality, injury by fellow servant, laches, license, misrepresentation, ~~mistake~~, payment, plene administravit or the administration of the estate is closed, recrimination, release, res judicata, statute of frauds, statute of limitations, waiver, **and any other matter constituting an avoidance or affirmative defense.**

Rule 8(c), SCRPC (emphasis added).

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4. Furthermore, Rule 12 provides that "[e]very defense, in law or fact, to a cause of action in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto" Rule 12(b), SCRCPP (emphasis added); see also Plyler v. Burns, 373 S.C. 637, 648, 647 S.E.2d 188, 194 (2007) ("Generally, 'a failure to plead an affirmative defense is deemed a waiver of the right to assert it.'"); Madren v. Bradford, 378 S.C. 187, 192-93, 661 S.E.2d 390, 393 (Ct. App. 2008) (affirming trial court's denial of a motion to dismiss based on an affirmative defense that was not pled in the defendant's answer and counterclaim based on Rules 8 and 12 of the SCRCPP).

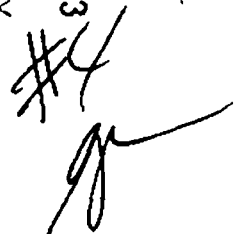
5. Unclean hands is an affirmative defense that is required to be plead. Aaron v. Mahl, 381 S.C. 585, 590, 674 S.E.2d 482, 485 (2009) (describing unclean hands as an affirmative defense); Wachovia Bank v. Coffey, 389 S.C. 68, 74, 698 S.E.2d 244, 247 n.1 (Ct. App. 2010) (describing unclean hands as an affirmative defense); Branche Builders, Inc. v. Coggins, 386 S.C. 43, 48, 686 S.E.2d 200, 202 n.4 (Ct. App. 2009) (noting that the failure to plead the affirmative defense of unclean hands is deemed a waiver of the right to assert it).

6. Therefore, Defendants were required to plead in their Answer the affirmative defense of unclean hands and the facts evidencing the unauthorized practice of law on which their unclean hands defense is based.

7. Defendants' Answer makes absolutely no mention of unclean hands, unauthorized practice of law, the Matrix line of cases, or the facts supporting such a defense in accordance with the requirements of the South Carolina Rules of Civil Procedure.

8. Therefore, this Court was correct to grant Plaintiff's Motion for Summary Judgment and deny Defendants' Motion for Summary Judgment.

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9. Furthermore, Defendants' service of its Motion for Summary Judgment based on unclean hands/unauthorized practice of law on Plaintiff's counsel at the hearing on Plaintiff's Motion for Summary Judgment more than 18 months after Defendants' Answer was filed with no mention of such a defense or the facts supporting such a defense is exactly the type of "surprise" defense Rule 8 is designed to avoid. Madren, 378 S.C. at 192-93, 661 S.E.2d at 393 (affirming denial of motion to dismiss filed one month before trial based on an affirmative defense that was not mentioned in their answer filed one year and nine months earlier).

10. Additionally, while Defendants are correct that State v. Buyers Service Co., Inc., 292 S.C. 426, 357 S.E.2d 15 (1987), was decided in 1987, this decision does not relieve Defendants of their duty under the Rules to affirmatively plead a defense based on such case law. It is Defendants' responsibility to put Plaintiff on notice that such a defense is being asserted against it by pleading it in their Answer, and they cannot abdicate this responsibility by relying on the existence of supporting case law. Earthscapes Unlimited, Inc. v. Ulbrich, 390 S.C. 609, 616, 703 S.E.2d 221, 225 (2010) (holding that defendants "cannot benefit from an affirmative defense that was never pled").

11. Because Defendants failed to plead the affirmative defense of unclean hands/unauthorized practice of law or the facts supporting such defense in accordance with the South Carolina Rules of Civil Procedure, and because Defendants should not be allowed to benefit by surprising Plaintiff with such a defense in a Motion for Summary Judgment, Defendants' Motion to Alter or Amend this Court's Order is hereby denied.

12. Next, Defendants unduly delayed filing their Motion to Amend their Answer to assert the affirmative defense of unclean hands.

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13. "The burden rests primarily upon the [movant] to amend his [pleadings], not upon the [non-moving party] to anticipate a new claim. Moreover, 'a motion to amend should be made as soon as the necessity for altering the pleadings becomes apparent. A party who delays in seeking an amendment is acting contrary to the spirit of the rule. Amendments near the time of trial may be particularly disruptive, and may therefore be subject to special scrutiny.'" Deasy v. Hill, 833 F.2d 38, 41 (4th Cir. 1987) (internal citations omitted); see also Sandcrest, 853 F.2d at 1148 (affirming denial of a motion to amend where the "motion was made 18 months after the last event giving rise to the causes of action in this case [and] more than 8 months after the filing of the initial complaint"); Dunbar v. Carlson, 341 S.C. 261, 270-71, 533 S.E.2d 913, 918 (Ct. App. 2000) (finding that the trial judge did not abuse his discretion in denying a motion to amend where the defendant "did not move to amend his answer until after the plaintiff rested her case at trial" although he was "well aware of this potential ground prior to trial"); Concrete Mix, Inc. v. James, 231 S.C. 416, 98 S.E.2d 841 (1957) (finding no abuse of discretion where trial court denied defendant's motion to amend answer to assert a new defense after the close of plaintiff's case).

14. Defendants' original Answer, filed January 6, 2011, made no mention of a defense based on unclean hands, unauthorized practice of law, the Matrix line of cases, or the underlying facts on which such a defense is based.

15. Defendants filed their Motion to Amend more than 18 months after their original Answer was filed, after written discovery was complete and six depositions had been taken and after Plaintiff was awarded summary judgment on its claims and Defendants' affirmative defenses.

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16. Furthermore, the defense they seek to add was available to them on August 8, 2011, the date of the re-filed opinion in Matrix, at the latest. Yet, Defendants waited almost an entire year after this opinion before moving to amend their pleadings to add this defense.

17. Additionally, because discovery was completed before Defendants filed their Motion to Amend, allowance of the proposed amendment would be prejudicial to Plaintiff.

18. Defendants' undue delay should not be rewarded, and their Motion to Amend is hereby denied.

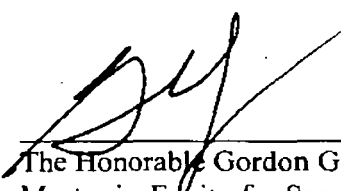
CONCLUSION

Based on the foregoing, this Court's Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment is correct. Furthermore, Defendants are not entitled to amend their pleadings to assert unclean hands, unauthorized practice of law, or the Matrix line of cases at this late stage of litigation. Therefore, it is hereby

ORDERED that Defendants' Motion to Alter or Amend this Court's Order Granting Plaintiff's Motion for Summary Judgment and Denying Defendants' Motion for Summary Judgment is denied; and

ORDERED that Defendants' Motion to Amend Pleadings is denied.

AND IT IS SO ORDERED.


The Honorable Gordon G. Cooper
Master-in-Equity for Spartanburg County

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October 25, 2012
Spartanburg, South Carolina

